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ABSTRACT

News media representatives foresee a growing use of remote-sensing satellites to gather data, including data that could be used to check government claims about military and other activities occurring anywhere on the planet. The satellite technology is developing rapidly, and several nations and private corporations are involved in separate efforts to market such data to news organizations and other customers. With costs dropping, major news organizations might, in the near future, seek to have their own satellites, and government national security interests, international obligations, and privacy concerns might conflict with media assertions of First Amendment rights to use the data. United States Government decisions to turn the remote-sensing satellite field over to private industry strengthen the media's legal position. News organizations have presented two proposals to resolve the conflicts. The first, which would establish standards for applying national security restrictions, is promising. The second, which would create an exemption for news organizations from present nondiscriminatory data distribution requirements, is seriously flawed. The technology is still young, and news gatherers must explore the many economic, legal, and social issues it raises. (Author/FL)

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"SpaceCam:" Legal Issues in the Use of Remote-Sensing Satellites for News Gathering

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ABSTRACT

This paper analyzes the legal and regulatory environment for news-gathering use of remote-sensing satellites. Satellite images would enhance the ability of news organizations to report on military developments and political and economic issues around the globe. Government national security interests, international obligations and privacy concerns may conflict with media assertions of First Amendment rights to use the data. News organizations have presented two proposals -- one promising, the other seriously flawed -- to resolve the conflicts.

ABSTRACT

This paper analyzes the legal and regulatory environment for the nascent practice of using remote-sensing satellites to gather data for news organizations. News media representative foresee growing use of such systems, including the use of the satellite images to check government claims about military and other activities at any spot on the globe. The satellite technology is developing rapidly. Several nations and private corporations are involved in separate efforts to market such data to news organizations and other customers. With costs dropping, major news organizations may in the not-too-distant future seek to have their own satellites. Government national security interests, international obligations and privacy concerns may conflict with media assertions of First Amendment rights to use the data. U.S. government decisions to turn the remote-sensing field over to private industry strengthen the media's legal position. News organizations have presented two proposals to resolve the conflicts. One, which would establish standards for applying national security restrictions, is promising. The other, which would create an exemption for news organizations from present non-discriminatory data distribution requirements, is seriously flawed.

"SpaceCam:" Legal Issues in the Use of Remote-Sensing Satellites for News Gathering

INTRODUCTION

"I get very frustrated in my job about the lack of independent access to information," ABC News National Security Assignment Editor Mark Brender says.[1]

"For example, we have the Reagan administration saying the Afghans are using advanced new Soviet fighter planes against the rebels. The Afghan consulate tells us no, they're not. We have no way to independently learn the truth because we can't get in to see what's actually happening."[2]

Brender's frustration is a common one for reporters, but he says he sees a technological cure for the problem in the form of remote-sensing satellites.

Such satellites have been circling the globe in polar orbits for more than a decade, used to reveal patterns of deforestation, the location of mineral deposits and the condition of farm crops.[3]

News organizations have used the satellite images occasionally, for such stories as a multi-part series by the Cox Newspapers on the human causes of such natural disasters as flooding and droughts[4] and an ABC World News Tonight report on the expansion of a military airfield in Lybia.[5]

LANDSAT, the U.S. government-owned satellite system which produced the images used for these stories, can only clearly show

objects that are at least 30 meters across.[6]

A new generation of satellites, which can see objects as small as a third of that size,[7] promises to greatly increase the potential usage of the images.[8] And, further technological improvements are on the way.[9]

The U.S. government now is committed to turning remote-sensing activities over to private industry.[10] The French in February this year launched a government-subsidized commercial remote-sensing satellite which, at this writing, is less than a month away from full-scale operation.[11]

The French system, with the acronym SPOT, for Systeme Probatoire d'Observation de la Terre, has both 10-meter resolution and stereo imaging capability.[12]

Japan, India, West Germany, Canada and a consortium of Western European countries are among the nations that have plans to enter the remote-sensing field. The Soviet Union already has such satellites aloft.[13]

There now is a delay of several days between when a satellite records an image and when the processed image is available for use. But some observers foresee virtually live broadcast capability from the satellites in the not too distant future.[14]

Several potential threats exist to achieving the expanded public knowledge about the world that remote-sensing satellites could bring.

1. Existing U-S statutes[15] appear to give government officials wide discretion to restrict satellite use on ill-

defined national security grounds.[16] Changes are needed to assure that first amendment rights are not abridged.

2. International treaty obligations and objections from nations whose territory is being observed could lead to satellite use restrictions.[17] This threat appears to be diminishing, largely as a result of continued U.S. commitment to nondiscriminatory distribution of the images [18], but it cannot be totally discounted.

3. Journalistic marketing pressures are coming into conflict with the government-established tradition in the field of distributing satellite images on a non-discriminatory basis. A budding effort to modify the status quo to assure satellite-owning news organizations "exclusives"[19] may create more problems than it solves.

(It should be noted that at the moment continued U.S. participation in the remote sensing field is not certain. Federal budget limitations threaten to eliminate subsidies the prospective owners of the first private U.S. system say are required for its operation.[20] Without the U.S. presence, and its commitment to open distribution of satellite images, foreign governments would be freed of an important competitive pressure restraining them from imposing restrictions on distriubtion of images from their satellite systems.)

A COMMERCIALIZATION BONUS

While such problems exist, the key decision by the Carter and Reagan administrations to privatize U.S. remote-sensing

operations[21] gives news organizations a much stronger legal case for unrestricted publication of the images from new, private satellites than exists with government ownership.[22]

The government to date has made data from LANDSAT satellites readily available at moderate cost to all private individuals, corporations and foreign governments that request it.[23]

The practice has been part of the U.S. "Open Skies" concept, aimed at defusing criticism that remote sensing amounts to spying. The theory is that not keeping the information gained a secret makes the surveillance activity more acceptable.[24]

But technical limitations -- on resolution and speed of image delivery -- have minimized the practical national security value of the LANDSAT images, and there is no guarantee that government policy might not change in the future as the technical limitations are overcome.

If news organizations were forced to challenge a U.S. government denial of access on national security grounds to satellite images taken by a government-owned satellite, the prospects for success would be limited.

The Supreme Court has refused to create a broad right of access to information that would parallel the First Amendment right to publish information already held by the news organization.

For example, in Houchins v. KQED[25] the court denied a news media request for special access to a county jail:

> This court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control....There is an undoubted right to gather news "from any source by any means within the law,"

> but that affords no basis for the claim that the First Amendment compels others -- private persons or governments -- to supply information....[26]

In Richmond Newspapers v. Virginia[27] the court did provide a right of access to criminal trials. Some justices suggested that the right had a first amendment basis and could be applied to other government activities, but others relied for their decision solely on the long Anglo-American common law tradition of public trials.

The federal Freedom of Information Act[28] creates a statutory right of access to government data, but it contains a broad exemption for national security information.[29]

Given existing judicial reluctance to get involved in second guessing government assertions of a national security exemption under FOIA,[30] it's doubtful that media plaintiffs would succeed in getting satellite images released if the government really wanted to keep them secret.

By contrast, the government would face steeper judicial hurdles in any effort to block publication of images from a privately-owned satellite.

For example, in Landmark Communication v. Virginia,[31] the Supreme Court overturned a state conviction of a newspaper for printing the name of a judge being investigated by a judicial review commission. Justice Stewart, in a concurring opinion, wrote:

> If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands

> of the press, unless the need for secrecy is manifestly overwhelming.[32]

When the government has asserted national security grounds for prior restraint on publication, the courts have scrutinized the claim closely, and generally rejected it.[33]

NATIONAL SECURITY AND THE SATELLITE STATUTES

Operation of U.S. private land remote-sensing satellites is regulated by the Land Remote-Sensing Commercialization Act of 1984, which also makes provision for turning the existing government-owned system over to private industry.[34]

The statute requires any person "subject to the jurisdiction or control of the United States" to obtain a license from the Secretary of Commerce before operating a remote-sensing system.[35] It further requires that the licensee "operate the system in such a manner as to preserve and promote the national security of the United States...."[36]

The statute also requires the Secretary of Commerce to:

> ...consult with the Secretary of Defense on all matters under this chapter affecting national security. The Secretary of Defense shall be responsible for determining those conditions, consistent with this chapter, necessary to meet national security concerns of the United States and for notifying the Secretary promptly of such conditions.[37]

Additional national security restrictions appear in the statute regulating the private rockets likely to be used to launch future remote-sensing satellites.

The Commercial Space Launch Act requires a license from the Department of Transportation for any launch vehicle launched by a U.S. citizen and requires government approval of the payload (the

satellite being launched).[38]

The Secretary of Transportation is given authority to suspend or revoke the launch vehicle license if necessary to protect "any national security interest or foreign policy interest of the United States,"[39] and the statute provides for consultation with the Secretary of Defense to identify such national security interests.[40]

The statute further provides authority to seize the payload at the launch site[41] and provides for civil penalties of up to $100,000 per day for violations of the act.[42]

Neither statute provides guidance on the nature of the national security concerns to be protected or the limits of permissible action to further those concerns.

The legislative history of the remote-sensing statute exhorts the Secretary of Commerce to hold hearings before imposing a national security restriction on the satellite system.[43] And it authorizes the Secretary to require agencies seeking such conditions to reimburse system operators for the costs of such conditions -- excluding anticipated profits.[44]

But it also specifies that the national security restrictions could include "limitations on resolution, geographic restrictions, or additional hardening of data requirements."[45]

The legislative history of the Commercial Space Launch Act lacks any limitation on national security restrictions and also lacks the remote-sensing act's reimbursement provision.[46]

Both statutes provide for consultation with additional agencies, including the Department of State for foreign policy issues, and the Federal Aviation Administration and Federal

Communications Commission.

An attorney who represents firms in the space launch field noted shortly before these statutes were adopted to codify the then-existing procedures that "an adverse position or decision from any of these agencies or institutions has the potential for halting any rocket launch program."[47]

On March 24, 1986, the Commerce Department issued proposed rules for issuing licenses under the remote-sensing act, but declined to clarify what, if any, limitations would be imposed under the national security provisions, saying " ... individual judgments are made in context affected by rapidly changing technology and must be made on a case-by-case basis."[48]

News media representatives are uneasy about the national security provisions.

Brender, who heads the Radio-Television News Directors Association's Media and Space Committee, says there are "real, legitimate national security concerns" in the remote-sensing area. But, he says, he doesn't want to have them used as an excuse for denying the public information to which it should have access.[49]

Brender says National Aeronautics and Space Administration officials have told media representatives planning for the first flight of a journalist on the space shuttle that "we couldn't take pictures from the shuttle of certain places because they're classified." While the news organizations are challenging that, they hope to preclude any similar effort to restrict creation or use of remote-sensing images.[50]

In addition to the possibility of attempts to block disclosure of images of specific sites, national security claims could be used to block overall advances in the resolving power of the satellites -- reducing the detail in all their images.

Some authors have reported that the 30-meter limit on LANDSAT images was set by the Pentagon.[51] Current U.S. military satellites are widely reported to clearly show objects as small as 1-meter in size.[52] It is not entirely clear how much of the lag in the civilian systems represents heavier investment by the military in research and development and how much is artificially created.

Economic issues may also play a role. The data stream that must be handled increases exponentially with increases in detail, requiring additional computing power and storage capability.

The news directors association has proposed supplemental language for the remote-sensing act's legislative history to specify that national security restrictions should only be invoked when they would meet the traditional prior restraint standards established by the Supreme Court.[53]

Congressional hearings on the RTNDA proposal are not expected until late summer at the earliest, but association officials say committee staff members have been receptive to the proposal.[54]

Observations

The media case for the broadest possible freedom to use remote-sensing satellites would be greatly strengthened by acceptance by the courts of the concept that the satellites themselves are a modern day analog of the printing press.

The satellite does gather information for later distribution to a mass audience through conventional print or broadcast means -- and thus might be likened to a reporter in the field.

But unlike the typical reporter, the satellite itself broadcasts that information back to any number of receiving stations on earth, thus publishing it; and the information is only then distributed more broadly by conventional means.

If the satellite is a press, then clearly Near v. Minnesota[55] applies and only the most extreme conditions could be used to justify a prior restraint. Similarily, restriction on further distribution of the images would be barred by the same theory that overturned a Griffin, Ga., ordinance requiring Alma Lovell to get a license before circulating her Jehovah's Witnesses religious tracts, i.e., that the right to distribute is inextricably linked with the right to publish.[56]

If the courts do not accept the satellite as a modern-day press, and see it only as an information gathering tool, then the analysis becomes more complicated.

Government attempts to impose national security restraints on commercial remote-sensing then could be seen to arise at two conceptually different stages of the process.

The simpler situation occurs if the satellite has already been launched and is feeding back images. Then the images are already in the possession of the publisher and the Supreme Court has indicated that only the gravest national security threat could justify restrictions at that stage.[57]

The more difficult situation occurs if the satellite has not

yet been launched and the government is seeking to impose restrictions on resolution or the geographic areas to be photographed by the not-yet-operating satellite.

In that arena the outcome is much less clear. The courts so far have generally failed to give much strength to claims of First Amendment protection for gathering the news, as opposed to disseminating information a publisher already possesses.[58]

Yet much of the difficulty for the courts in arriving at what from the news media perspective would be a proper result, seems to stem from the factual situations under which most of the cases arose -- situations which can be clearly distinguished from the private remote-sensing satellite.

Many of the access cases have involved news media demands for access to documents possessed by the government, in which the statutory exemptions created by the Freedom of Information Act have defeated the media claim.[59] or demands for special media access to government facilities in which the access demand seems to have been balanced against the government's property rights.[60]

Others involved news media efforts to get information in ways which arguably violated individual privacy rights[61] or amounted to harassment.[62]

Yet another case involved the assertion of a right to travel to Cuba despite a State Department ban.[63]

None of these countervailing interests exist in the remote-sensing satellite situation.

The news organization is not asking for data from the government or access to government property -- only the right to

gather the data without government interference.

The news organization is not -- at least given present day satellite imaging capabilities -- in a position to invade personal privacy or harass individuals through this news gathering technique.

No travel to foreign countries by U.S. citizens is involved -- and the satellite only travels in the void of space, outside any national jurisdiction.

In addition, the press here is seeking no special right beyond that of any other citizen to gather the information, thus avoiding all the definitional and administrative problems and the appearance of special pleading.[64]

Nor is the national security claim especially strong, given the probability that the Soviet Union's military remote-sensing satellites have considerably greater resolving power than that of any U.S. commercial satellite.[65]

Thus, this might well be an instance in which the right to gather news suggested by Justice White in Branzburg v. Hayes[66] would be given substance.

Clearly a restriction on satellite imaging capability or its geographic range would be the most pernicious type of prior restraint -- barring completely publication of a vast array of data based on speculative assessment of the damage it might cause.[67]

INTERNATIONAL TREATY OBLIGATIONS

The Outer Space Treaty,[68] which was adopted by the United States and other nations in 1967, provides both protection for,

and restrictions on, remote-sensing satellite activities.

On the one hand, the treaty provides that "Outer space ... shall be free for exploration and use by all States without discrimination of any kind...."[69]; that "There shall be freedom of scientific investigation in outer space...."[70], and that "Outer space ... is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[71]

These provisions clearly support the right to gather remote-sensing data, although, as will be explored in more detail later, not all countries have embraced that concept.

But the treaty also imposes responsibility on each country for the activities of its nationals in outer space, "whether such activities are carried on by governmental agencies or non-governmental entities ... "[72]; requires government authorization and supervision of activities by non-governmental entities[73], and holds the government liable for damage caused by objects launched into space by its citizens or from its territory.[74]

Given the inability of any international body to effectivly police the activities of any group that might want to launch an object into space, such provisions probably are necessary. But they also have been used to justify the licensing provisions in the Commercial Space Launch Act[75] -- provisions which also open the possibility of abusive national security-based claims for limitations on remote-sensing systems.

Many developing countries have objected to the idea of

satellites taking pictures of their territory, and the United Nations has been debating what to do about it since 1969, three years before the first LANDSAT was launched.[76]

The countries have worried both about the possibility the satellites would disclose to potential enemies information of military significance[77] and that the satellites would reveal information of economic value.

On the economic front, major concerns have been that commodities traders might learn the condition of major export crops and be able to manipulate the market price, and that multinational mineral exploration companies would learn information about mineral deposits and their extent that would give them an unfair advantage in bargaining for leases.[78]

Developing countries at various times have sought to require:

* prior consent of the country being observed before a satellite could take pictures;
* prior consent to distribution of the images; and
* free or low cost distribution of the images to the country being observed.[79]

The efforts to require consent or restrict distribution have failed so far, in part because of provisions in the Outer Space Treaty calling for full public disclosure of information learned from activities in space.[80]

In addition, several of the developing countries, including Brazil, India and China, have decidec to get into the remote-sensing satellite business themselves -- which has altered their perspective on the problem.[81]

But the concept of unrestricted, low cost distribution of the images has retained viability and has been made a part of the Land Remote-Sensing Commercialization Act.[82]

The statute establishes as government policy "that civilian unenhanced remote-sensing data be made available to all potential users on a nondiscriminatory basis...."[83] System operators are required to sell data on that basis,[84] and, in addition, are required to sell data to the government for a public archive.[85]

Initially the system operator would have the exclusive right to sell the data contained in the archive, but after a period of years the government would be entitled to distribute the data itself at nominal cost, in competition with the system operator.[86]

The legislative history of the statute indicates that these provisions were adopted in furtherance of the government's "open skies" policy and to demonstrate "to the entire world U.S. adherence to the principle of the free flow of information."[87]

Such a policy of free exchange of civilian data from space has been part of U.S. policy since the Eisenhower administration.[88]

But it has caused at least one firm to back out of plans to launch remote-sensing devices aboard the space shuttle. Officials of the Sparx Corporation contend that being denied the ability to sell exclusive images to the highest bidder would ruin the commercial market for their service -- which they estimate at up to $20 million a year.[89] Sparx decided to negotiate with the European Space Agency to ride into the sky aboard its Ariane

rocket instead.[90]

News media representatives are concerned about the ban on exclusivity for the images -- particularily for the day, sometime in the future, when a network might launch its own remote-sensing satellite system.

"No matter how much CBS is willing to pay," Brender says, "ABC may want to be able to show the images first if it paid to launch the satellite."[91]

RTNDA has proposed amending the statute to deal with that problem. The amendment would permit any satellite licensee engaged in newsgathering and dissemination to publish the results of that work to its own audience before making the unenhanced data from the satellite available to all other users on the nondiscriminatory basis called for in the statute.[92] Hearings on the proposal may be held late this summer.[93]

It should be noted that while the arrangement for exclusives RTNDA envisions would not be permitted by the present statute, it does state that "The sale of data on a nondiscriminatory basis does not preclude the system operator from offering discounts ...."[94]

And the legislative history of the act suggests " ... a pricing policy that allowed a system operator to vary the price of data in inverse relation to the time of data delivery would be acceptable if the data were available to all potential customers."[95]

Thus a news organization could contract to be among the first to get the data by paying a premium rate.

Discussion

The news directors association's proposal for limited data exclusivity is not without merit. Certainly news organizations have spent heavily on new technology in the past in hopes of gaining a competitive edge. So-called Satellite News Gathering, using mobile trucks with satellite transmitter dishes to bounce television signals off communication satellites, is rapidly increasing in popularity today.[96] Satellite news gathering using remote-sensing satellites could become a major factor in the industry tomorrow.

But it is unclear whether the exclusivity provisions proposed are really warranted.

First, they clearly would compromise the "open skies" principle, though to a lesser extent than a permanent right to withhold distribution.

Second, questions can be raised about whether priority access to data is what will make the real difference on most remote-sensing news stories of lasting value. Certainly, once news organizations know a major spot news event is underway in an inaccessible location -- a hijacking, an invasion -- exclusive access to photos of the scene would have competitive value. And perhaps that competitive edge is needed to sell management on investing in a satellite system. But from a societal point of view, the satellites may be much more valuable in providing data for stories that haven't been discovered yet -- trend stories, analyses of shifting patterns over time. What will be needed in that situation is not exclusive access, but a reporter with a

fresh idea of what to look for among the vast supply of images the satellites will provide. Owning the haystack won't do much good if you don't know what needle to look for, and no news organization can hope to monopolize the store of good ideas. If the satellites are viewed mainly as tools for spot news coverage, sufficient effort may not be devoted to the work of more lasting value, because it would require additional investments of time and money on the ground for analysis and research.

Third, the statute and legislative history already make it possible for news organizations willing to pay for it to get priority access to satellite images. All that is barred is excluding other deep-pocket users from the rush to be first. This would appear to provide a reasonable accomodation, at least until the day when the market justifies many satellites and several news organizations place their own in orbit, since surely an exclusive deal with one network by a third-party satellite operator would lead to objections from other networks based on the "open skies" policy.

In fact, in the near term the RTNDA proposal might antagonize more newsgathering organizations than it would help. Imagine that one news organization becomes a satellite licensee by buying even a small share of the ownership of the first U.S. licensed private satellite and that economic considerations make the launch of additional satellite systems impractical for several years. During that time the network that had the foresight to buy into "the only game in town" would be able to freeze its competitors out of the race to be first with the satellite news.[97]

The RTNDA proposal does not specify a time limit for exclusivity. Presumably a news organization could withhold great quantities of its satellite data indefinitely, claiming it was still analyzing the material for possible news use.

Any request by news organizations for favored treatment by the government should be viewed with skepticism, since it inevitably raises dangers that the government will expect a favor in return. And should the deal go sour, the government could withdraw the privilege, amid cries of alarm to the voters about the unreasonable demands and special interest pleadings of the media.

The RTNDA proposal steers clear of the worst of the special privilege dangers news organizations have run into on the shield law front, for example, by giving the privilege to all news gatherers, not just to specific media. But the wording is not as inclusive as some statutory formulations that would more clearly include scholars and others who disseminate information to the public.[98] Arguably any special consideration should be framed in the broadest possible First Amendment terms so it applies to all who would engage in public discourse, rather than just to those who are employed in certain fields.

At the same time the proposed wording is broad enough as it stands to be open to abuse by commodity traders and others who might seek to get a marketplace advantage from the data. Such operators could easily add some news gathering and distribution activities to their businesses to qualify for the exemption.

Cornering the market in commercial satellite data may

diminish as a practical danger as the number of satellites and their owners increase, but it cannot be dismissed at this stage.

If there is to be an exclusivity provision, it may need to be coupled with a provision barring the use of the information for financial gain -- other than through the publication process itself -- while the data remains a secret.[99]

Any provision that requires a news organization to share its work product with others does raise troubling concerns. A photographer would be outraged by a government demand to share with the rest of the world photographs taken here on earth. But if the high cost of getting to the scene made it impossible for more than one photographer to get the picture -- and the government was to determine who that photographer would be -- a pool arrangement might well be in order.

Analogies to the spectrum scarcity argument used to justify the fairness doctrine and other half-century old restrictions on broadcasting are likely to be repugnant to many news broadcasters today, who see them as hobbling their First Amendment rights in an era when most communities have far more broadcast than print news outlets. But at least at this early stage of the development of the commercial remote-sensing satellite industry, they may have some validity.[100]

On balance, the RTNDA priority access proposal -- with the modifications outlined -- would not clearly be a mistake. But it is unsatisfactory as it stands, and even with modification has enough problems to not merit whole-hearted support.

PRIVACY CONCERNS

Looking at LANDSAT 30-meter resolution pictures it seems difficult to imagine remote-sensing satellite images giving rise to personal privacy issues. A good-sized house is merely a dot.

But with resolution capabilities improving dramatically, the day when a supermarket tabloid newspaper might buy satellite photos to intrude on the privacy of the backyard swimming pools of the famous may not be all that distant. More sinister uses to track the whereabouts of citizens are not beyond imagining either.

Should that day arrive the courts will be faced with an interesting conceptual dilemna.

Distinctions about what is and is not improperly intrusive behavior for privacy law purposes have generally been made on the basis of whether the image or recording in question was made from a public place.

For example, in Marks v. King Broadcasting[101] a pharmacist's claim that a news photographer's picture of him in his shop invaded his privacy was rejected because the photographer took the shot through a window while standing on a public sidewalk.

By contrast, in Dietemann v. Time, Inc.,[102] a faith healer won his case against two Life Magazine staffers who surreptitiously recorded his "examination" of a patient in his home.

In addition to the public versus private place distinction, intrusion cases are often influenced, as the Dietemann case was, by the surrepticious nature of the surveillance.

Will courts regard a backyard, or other private property open to the sky as a private place for privacy law questions when the surveillance is done from a place as public as outer space -- which existing law holds not to even be subject to national sovereignty? How more public can you get than that?

Yet traditionally people have fenced their yards and grown hedges to screen the yard from view -- to assure the privacy that future satellite images might violate.

And is remote-sensing done surreptitiously? The satellite is invisible from the ground and does not announce its presence. But at the same time it should quickly become common knowledge that such satellites are in the sky -- once the published images start to look interesting.

One author suggests that courts have not yet even been confronted with a closely analogous earthbound case -- such as a photo of a pool in a fenced back yard taken with an extreme telephoto lens from public property on a nearby hill. But he suggests that courts might limit the viewed from a public place concept if faced with such facts.[103]

OTHER CONCERNS

The use of remote-sensing satellites for news gathering is still in its infancy. As such, many issues such use raises -- legal, economic and social -- remain to be explored.

Among the questions:

* How can the integrity of data from such satellites be assured? The computers used to create the satellite images could

also be used by the unscrupulous to manipulate those images -- to make new missile sites appear where none really exist, or erase ones that are being built. Given enough suppliers with competing interests, the marketplace itself may provide the cure for such misdeeds. But in a field that has yet to prove its economic viability, there's no assurance sufficient competition will actually develop. Perhaps there is need for legislation on the data integrity question.

* How can the new technology be reconciled with existing espionage laws, which make it illegal to photograph many U.S. military installations? Clearly such statutes cannot be enforced against Soviet remote-sensing satellites or against those of other nations. Does that then mean that Americans will be the only persons not able to know what such installations look like?

* Suggestions have been made that remote-sensing satellites could be used to create a data base for an international agency dedicated to monitoring crisis situations around the world and checking compliance with treaties.[104] From one perspective, news organizations would seem to have common interests with such an organization and might have the financial resources to at least participate in making it a reality. Yet traditional journalistic values of detachment from organizational ties that might create a perception of conflict of interest or of political bias may work against any such association. Given the high value of preventing or at least limiting wars, the ethical trade offs of each position are worthy of close study.

Notes

1. Interview with author, March 14, 1986.

2. Id.

3. Joyner, Selling Satellites: The Commercialization of LANDSAT, 26 Harv. Int'l L.J. 63 (1985), at 66.

4. Darts and Laurels, Columbia Journalism Review, March/April 1986, at 25.

5. World News Tonight, ABC News, March 13, 1986.

6. Marshall, Commercialization of Space: Incentives, Impediments and Alternatives, 12 J. Space L. 163 (1984), at 165.

7. Id.

8. Wellborn, Reporting in Orbit: Will the First Amendment Survive in Space, Science Writers Newsletter, December 1985.

9. Brender interview, supra note 1.

10. Land Remote-Sensing Commercialization Act of 1984, Pub.L. 98-365, 98 Stat. 451 (1984), 15 U.S.C.A. 4201.

11. Joyner, supra note 3, at 79-81; Brender interview, supra note 1; Marshall, supra note 6.

12. Id.

13. Id.

14. Scharff, RTNDA Launches Congressional Initiative on Remote Sensing from Outer Space, forthcoming in RTNDA Communicator April 1986.

15. Land Remote-Sensing Commercialization Act of 1984, supra note 10; Commercial Space Launch Act, Pub.L. 98-575, 98 Stat.3055 (1984), 49 U.S.C.A. 2601.

16. Scharff, supra note 14.

17. Ambrosetti, Remote Sensing from Outer Space: Its Significance and Problems from a Third World Perspective, 17 N.Y.U. J. Int'l L. & Pol. 1 (1984).

18. Joyner, supra note 3, at 76-78.

19. Brender interview, supra note 1; Scharff, supra note 14.

20. Brender interview, supra note 1.

21. Senate Report No. 98-458 on H.R. 5155, Land Remote-Sensing Commercialization Act, 1984 U.S. Cong. & Admin. News 658, at 659. See also: State of the Union Message, 20 Weekly Comp. Pres. Doc. 87 (Jan. 30, 1984); President's Radio Address On Space, 20 Weekly Comp. Pres. Doc. 113 (Feb. 6, 1984).

22. Interview by author with Robert Aamoth, legal counsel to Radio-Television News Directors Association, February 28, 1986.

23. Land Remote-Sensing Commercialization Act of 1984, supra note 10.

24. Senate Report No. 98-458 on H.R. 5155, supra note 21 at 684-686.

25. 438 U.S. 1 (1978).

26. Id. at 9-11.

27. 448 U.S. 555 (1980).

28. Freedom of Information Act, Pub. L. 89-554 (1966), 80 Stat. 383, 5 U.S.C.A. 552.

29. Id., as amended by Pub.L. 93-502 ss 1-3 (1974), 88 Stat. 1561-1564.

30. See, e.g., Knopf v. Colby, 502 F.2d 136 (4th Cir. 1975).

31. 435 U.S. 829 (1978).

32. Id. at 849.

33. See, e.g., New York Times v. United States, United States v. Washington Post, 403 U.S. 713, 91 S.Ct. 2140 (1971).

34. Land Remote-Sensing Commercialization Act of 1984, supra note 10.

35. Id. at ss. 402, 98 Stat. at 459, 15 U.S.C.A. at 4242.

36. Id.

37. Id. at ss. 607, 98 Stat. at 465, 15 U.S.C.A. at ss. 4277.

38. Commercial Space Launch Act, supra note 15, at ss 6, 98 Stat. at 3057, 49 U.S.C.A. at 2605.

39. Id.

40. Id. at ss 20, 98 Stat. 3062, 49 U.S.C.A. at 2619.

41. Id. at ss 17, 98 Stat. 3061, 49 U.S.C.A. at 2616.

42. Id. at ss 19, 98 Stat. 3062, 49 U.S.C.A. at 2618.

43. Senate Report No. 98-458, supra note 21, at 678-679.

44. Id., at 690-691.

45. Id., at 691.

46. Senate Report No. 98-656 on H.R. 3942, Commercial Space Launch Act, 1984 U.S. Cong. & Admin. News 5328.

47. Myers, Federal Government Regulation of Commercial Operations Using Expendable Launch Vehicles, 12 J. Space L. 40 (1984), at 41.

48. Licensing of Private Land Remote-Sensing Space Systems, Notice of Proposed Rulemaking, 15 CFR Part 960, 51 Fed. Reg. 9971, at 9973.

49. Brender interview, supra note 1. The RTNDA committee also includes representatives from the National Association of Broadcasters, the American Society of Newspaper Editors, the American Newspaper Publishers Association, the Society of Professional Journalists, the Associated Press and the Magazine Publishers Association.

50. Id.

51. See, e.g., Sanders, Etiquette for the Age of Transparency: Public Access to Public Monitoring from Space, Whole Earth Review, Spring 1986, pp 56-61, at 57.

52. Id.

53. Scharff, supra note 14.

54. Aamoth interview, supra note 22.

55. 283 U.S. 697, 51 S.Ct. 625 (1931).

56. Lovell v. City of Griffin, 303 U.S. 444, at 452, 58 S.Ct. 666 (1938), at 668.

57. New York Times Company v. United States; United States v. Washington Post, supra note 33.

58. See Pember, The Burgeoning Scope of "Access Privacy" and the Portent for a Free Press, 64 Iowa Law Review 1155 (1979), at 1161-1172.

59. See Knopf v. Colby, supra note 30.

60. See Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2811 (1974); Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800 (1974).

61. Le Mistral, Inc. v. CBS, 61 App. Div. 2d 491, 402 N.Y.S.2d 815 (1978).

62. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

63. Zemel v. Rusk, 381 U.S. 1 (1964).

64. See Malmgren, First Amendment: Freedom of the Press to Gather News, 20 Villanova L. Rev. 189 (1974).

65. Sanders, supra note 51.

66. 408 U.S. 665 (1972), at 681.

67. For an example of a district court case in which the government national security prior restraint request was upheld, see United States v. Progressive, Inc., 467 F.Supp. 990 (1979).

68. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 206. [herinafter cited as Outer Space Treaty].

69. Id., art. I.

70. Id.

71. Id., art. II.

72. Id., art. VI.

73. Id.

74. Id., art. VII.

75. Senate Report No. 98-656, supra note 46, at 5336.

76. Ambrosetti, The Relevance of Remote Sensing to Third-World Economic Development: Some Legal and Political Aspects, 12 N.Y.U. J. Int'l L. & Pol. 569 (1980).

77. Joyner, supra note 3, at 90.

78. Ambrosetti, supra note 76, at 578.

79. See Joyner, supra note 3; Ambrosetti, supra note 17; and Ambrosetti, supra note 76, for a fuller discussion of the United Nations debate.

80. Outer Space Treaty, supra note 68, art. XI.

81. Ambrosetti, supra note 17.

82. Land Remote-Sensing Commercialization Act of 1984, supra note 10.

83. Id., at ss 103, 98 Stat. at 452, 15 U.S.C.A. at 4203.

84. Id., at ss 601, 98 Stat. at 463, 15 U.S.C.A. at 4271.

85. Id., at ss 602, 98 State. at 463, 15 U.S.C.A. at 4272.

86. Id.

87. Senate Report No. 98-458, supra note 20, at 685.

88. Eisenhower, Summary of Important Facts in Earth Satellite Program, 37 Dep't St. Bull. 673 (1957).

89. Remote Sensing Sparks a Row over America's Space Policy, The Economist, July 21, 1984, at 75-76.

90. Id.

91. Brender interview, supra note 1.

92. Scharff, supra note 14.

93. Aamoth interview, supra note 22.

94. Land Remote-Sensing Commercialization Act of 1984, supra note 10, at ss 104, 98 Stat. 452, 15 U.S.C.A. 4204.

95. Senate Report No. 98-458, supra note 20, at 685.

96. Broholm, SNG Research, RTNDA Communicator, November 1985, pp. 26-27.

97. The only proposal now under consideration for the takeover of the government's LANDSAT system comes from a joint venture of Hughes Aircraft and RCA, the parent corporation of NBC. Exclusivity, if authorized, might be implemented quickly.

98. See, e.g., Privacy Protection Act of 1980, Pub. L. 96-440, 94 Stat. 1879, 42 U.S.C.A. 2000aa.

99. See, generally, Lively, Security Regulation and Freedom of the Press, 60 Wash. L. Rev. 843 (1985)

100. See, generally, Becker, Electronic Publishing: First Amendment Issues in the Twenty-first Century, 13 Fordham U.L.J. 801 (1985).

101. 618 F.2d 572 (1980).

102. 499 F.2d 245 (1971).

103. Pember, Mass Media Law (1984), at 207.

104. The Implications of Establishing an International Satellite Monitoring Agency, United Nations Document No. E.83.IX.3 (1983).